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No. 82-

# In the Supreme Court of the United States

OCTOBER TERM, 1982

FOX RIDGE ASSOCIATES & CO.,
APPELLANT,

*v.*

BOARD OF ASSESSORS OF THE
TOWN OF MARSHFIELD,
APPELLEE.

## ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

## JURISDICTIONAL STATEMENT

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# I

## QUESTIONS PRESENTED

Whether Section 10 of Mass. G.L. Ch. 58A, which, as interpreted by the Supreme Judicial Court of the Commonwealth of Massachusetts, requires a stenographic record of the proceedings before the Massachusetts Appellate Tax Board ("ATB"), in order for the appeal of the Fox Ridge Associates & Co. ("Fox Ridge") to the Massachusetts Supreme Judicial Court to be decided on its merits, is in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| The Question Is Substantial | 5 |
| 1. The Complained of Construction of Mass. G.L. Ch. 58A Section 10 and the Application to Fox Ridge Has Deprived Fox Ridge of Due Process. | 5 |
| Conclusion | 7 |

APPENDIX A

Decision of the Supreme Judicial Court for the Commonwealth of Massachusetts ..... 8

APPENDIX B

Decision of the Supreme Judicial Court, *New Bedford Gas & Light* v. *Board of Assessors*, 368 Mass. 745 ..... 10

APPENDIX C

Decision of the Appellate Tax Board for the Commonwealth of Massachusetts ..... 19

APPENDIX D

Findings of Fact and Report of the Appellate Tax Board for the Commonwealth of Massachusetts .... 20

APPENDIX E

Petition for Rehearing ..... 24

Page

APPENDIX F

Judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts Denying Petition for Rehearing ..... 28

APPENDIX G

Statute Involved, Massachusetts General Laws, c. 58A, §10 ..... 29

APPENDIX H

Notice of Appeal to the Supreme Court of the United States ..... 30

APPENDIX I

Order of Justice Brennan Extending Time for Docketing the Appeal ..... 32

TABLE OF AUTHORITIES

**Cases**

*Arthurs* v. *Board of Registration in Medicine*, 383 Mass. 272 (1981) ..... 6

*Board of Assessors of Nahant* v. *Costin*, 356 Mass. 726 (1969) ..... 6

*Japan Lines Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) ..... 2

*New Bedford Gas & Light* v. *Board of Assessors*, 368 Mass. 745 (1975) ..... 8

*New Boston Garden* v. *Board of Assessors of Boston*, 383 Mass. 456 (1981) ..... 5

*Salisbury Water* v. *Department of Public Utilities*, 344 Mass. 716 (1962) ..... 6

*Weinfield* v. *Assessors of Hull*, 354 Mass. 760 ..... 5

**Statutes**

28 U.S.C. §1257(2) ..... 2

Mass. G.L. Ch. 58A, Sec. 10 ..... 2, 3, 4, 5

Ch. 30A, Sec. 11(8) ..... 6

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**ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS**

## JURISDICTIONAL STATEMENT

Fox Ridge Associates & Co. ("Fox Ridge") appeals from a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts ("Supreme Judicial Court") holding that the absence of a transcript of the evidence presented to the Massachusetts Appellate Tax Board ("ATB") precluded the Court from being able to pass upon the Fox Ridge claim that the ATB decision was not supported by substantial evidence.

## Opinions Below

The decision of the Supreme Judicial Court for the Commonwealth of Massachusetts, which is reproduced as Appendix A, is reported at 387 Mass. 1002, and the decision of said Court, upon which it relies and which specifically refers to Mass. G.L. Ch. 58A Section 10 as controlling, is reproduced as Appendix B. The decision and findings of fact and report of the Appellate Tax Board, dated October 22, 1980, are reproduced as Appendix C and D. Fox Ridge petitioned for rehearing of the decision of the Supreme Judicial Court which was denied by order dated November 23, 1982, copies of which petition and order are reproduced as Appendix E and F respectively.

## Jurisdiction

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Judicial Court holding that Mass. G.L. Ch. 58A, Sec. 10 is valid and finally determinative of Fox Ridge's appeal, thereby preventing a review of the ATB decision on its merits. The statutory provision is reproduced as Appendix G. In its appeal to the Supreme Judicial Court and Petition for Rehearing, Fox Ridge drew into question the validity of the statute as applied to the particular fact situation.

Appeal is available to challenge the validity of a statute as applied to a specific case, *Japan Lines Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 1817; 60 L.Ed.2d 336 (1979).

The judgment of the Supreme Judicial Court was entered on October 27, 1982, and the decision on the Petition for Rehearing was entered on November 23, 1982. Notice of Appeal to this Court, reproduced as Appendix H, was filed in the Supreme Judicial Court on January 17, 1983. On February 8, 1983, Justice Brennan extended the time for docketing the appeal to and including April 20, 1983, reproduced as Appendix I.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(2).

## Statutes Involved

Section 10 of Mass. G.L. Ch. 58A is reproduced as Appendix G.

## Statement of the Case

*Proceedings Below*

Fox Ridge, the owner of land and residential apartment buildings on Plain Street, Marshfield, Massachusetts, applied to the Assessors of the Town of Marshfield (Marshfield) for an abatement of the real estate taxes assessed for fiscal year 1980 and the application was denied. Fox Ridge appealed to the Appellate Tax Board ("ATB") and after a finding of jurisdiction, a hearing was convened and concluded.[1] The issues on appeal were overvaluation and disproportionate assessment. Fox Ridge presented the testimony and report of an expert witness who utilized the capitalization of income approach to value. Marshfield did not attend the hearing and no evidence was presented in its behalf. Fox Ridge did not arrange for an official stenographic record of the proceedings which, pursuant to Mass. G.L. Ch. 58A, Sec. 10, is an option available to either party.

The expert witness testified that the fair cash value of the property for fiscal 1980 was $2,800,000, based upon a net income of $452,610 and a capitalization rate of .16, comprised of .093 rate of return, .0286 depreciation recapture and .0382 tax factor. (Findings, page 3, lines 15-19 App. D).

The Appellate Tax Board found a fair cash value of $4,574,000 (and an indicated tax some $75,000 greater than that indicated by the expert witness), by decision dated October 22, 1980, and Fox Ridge made a request under Mass. G.L. Ch. 58A, Sec. 13 for findings of fact and report which was promulgated on February 4, 1982. Fox Ridge appealed from the decision and findings.

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[1] The hearing involved the taxes for fiscal 1979 as well; but the decision for such year was not appealed.

The ATB, in connection with its determination of fair cash value, rejected Fox Ridge's expert's reserve for replacement of short-lived items and rejected also his expenses of administration and renting, substituting therefor a 6% management fee (Findings, pages 3 and 4, lines 21-25, lines 1-5 respectively App. D). The net effect of such rejection was to increase the net income figure of the expert by $91,698. The ATB rejected also the expert's capitalization rate of .16 and adopted instead a capitalization rate of .119. Except for an allusion to HUD financing restrictions, (Findings, page 4, lines 12-16 App. D), no reason is set forth in the findings for such rejection, substitution and adoption.

Fox Ridge appealed to the Supreme Judicial Court. In their briefs, Marshfield relied upon Mass. G.L. Ch. 58A Sec. 10, and Fox Ridge relied upon the inapplicability of said statute to the fact situation. The Supreme Judicial Court, citing decisions in which the said statute was deemed applicable (App. B) rejected Fox Ridge's claim of non-applicability and affirmed the decision of the ATB.

*Facts*

Section 10 of Mass. G.L. Ch. 58A has existed in its present form at all times material to Fox Ridge's appeal. The relevant portion provides that "...If no party requests that the proceedings be reported, all parties shall be deemed to have waived all rights of appeal to the Supreme Judicial Court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence. The right of appeal upon questions of law raised by the pleadings or by an agreed statement of facts or shown by the report of the Board shall not be deemed to be waived..."

In essence, it was and is Fox Ridge's position that the cited implied waiver does not apply to a situation where only one side to the dispute is presented to the trial court.

## The Question Is Substantial

The complained of construction of Mass. G.L. Ch. 58A Section 10 and the application to Fox Ridge has deprived Fox Ridge of due process.

The complained of construction of Section 10 establishes the trial court as a surrogate party to the proceedings and places the trial court in conflict with its judicial function. It is one thing for the trial court to analyze, accept and reject competing evidence; it is quite another for the trial court to accept in part, and reject in part, evidence presented by one party only. In the former situation, the cited portion of Section 10 is logical; but in the latter situation it is illogical and would be a denial of due process to Fox Ridge contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. There is no reported precedent dealing with the issues.

We have here, therefore, a substantial question, which question was specifically before the Supreme Judicial Court. In its Petition for Rehearing, (App. E), Fox Ridge raised the due process issues as follows:

> "...it is Appellants' thesis that the Appellate Tax Board has no right to interject its own opinions with respect to questions of valuation and methodology for arriving at value.
>
> "Appellants' Appeal does not deal with the substance of the Decision below; but rather whether the Appellate Tax Board had the right to substitute its own opinion, without rejecting the Appellants' testimony and evidence. Under the theory of *Weinfield* v. *Assessors of Hull*, 354 Mass. 760, Appellant has met the burden of creating and assembling a record sufficient for this Court to decide the case.
>
> "Following the rule of *New Boston Garden Corp.* v. *Board of Assessors of Boston*, 81 AS 1023, evidence of a party

having the burden of proof may not be disbelieved without an explicit and objectively adequate reason. The Appellate Tax Board violated this rule by substituting its personal opinion as to appropriate expenses and capitalization rate, in a case where the Appellee chose not to participate in the proceedings and test the sufficiency of the Appellants' position as to the same. The Appellate Tax Board had no evidence before it to support its decision. It is conceded under the principle of *Nahant* v. *Costin*, 356 Mass. 726, that the Board was not required to accept the opinion expressed, or the valuation principles used, by the Appellants' expert witness. However, the Board did have the responsibility of giving objectively adequate reasons for disbelieving or qualifying the opinion of value offered by the Appellant.

"Although the Appellate Tax Board is exempted from the provisions of the State Administrative Procedure Act, (Chapter 30A), the Board is still bound by general principles affecting administrative decisions and judicial review of them. The obligation of the Board with respect to its findings is set forth in Mass. General Laws, Chapter 30A, section 11(8). 'Every agency decision shall be in writing. . . and shall be accompanied by a statement of reasons for the decision, including the determination of each issue of fact or law necessary to the decision. . .' In *Salisbury Water* v. *Department of Public Utilities*, 344 Mass. 716, the Court said that one of the duties of judicial review is to determine "upon consideration of the entire record" whether substantial rights have been prejudiced because the agency decision was unsupported by substantial evidence. . .

". . . A finding without evidence is arbitrary and baseless". (In *Arthurs* v. *Board of Registration in Medicine*, 81 AS 849, the Court observed that while the Board of Registration in Medicine is free to evaluate evidence in light of

its expertise, it cannot use its expertise as a substitute for evidence in the record.

"The issue cited does not require a transcript to be reviewed by the Supreme Judicial Court."

If the decision of the Supreme Judicial Court is allowed to stand, especially with a specialized tribunal such as ATB, the likelihood of due process will be diminished.

**Conclusion**

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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## APPENDIX A

# SUPREME JUDICIAL COURT

OF MASSACHUSETTS,

SUFFOLK

---

FOX RIDGE ASSOCIATES & CO.

*v.*

BOARD OF ASSESSORS
OF MARSHFIELD

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Before HENNESSEY, C.J., and
WILKINS, LIACOS, NOLAN and O'CONNOR, JJ.

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*Walter L. Sullivan*, Scituate, for plaintiff.
*John F. Ridge*, Cohasset, for defendant.

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RESCRIPT
Argued Oct. 8, 1982
Decided Oct. 27, 1982

[1] Fox Ridge Associates & Co. (Fox Ridge) appeals from a decision of the Appellate Tax Board (board). The board granted an abatement in local real estate taxes, assessed for the 1980 fiscal year, in an amount not acceptable to Fox Ridge. We have no transcript of the evidence before us, and, therefore, we cannot pass on Fox Ridge's claim that the board's action was not supported by substantial evidence. *New Bedford Gas & Edison Light Co.* v. *Assessors of Dartmouth*, 368 Mass. 745, 749-751, 335 N.E.2d 897 (1975).

[2] Fox Ridge presented the only expert testimony as to the fair cash value of the property. The assessors did not appear at the hearing. Fox Ridge challenges certain of the board's determinations which rejected the position taken by Fox Ridge's expert. Because we do not have the evidence that was before the

board, we cannot say that the board lacked "a rational articulable basis in the evidence" (*New Boston Garden Corp.* v. *Assessors of Boston*, __ Mass. __, __, Mass.Adv.Sh. [1981] 1023, 1041, 420 N.E.2d 298 (1981)) for reaching different conclusions from those of Fox Ridge's expert on the appropriate capitalization rate and on the treatment of certain expense items. The board was not required to accept the testimomy of Fox Ridge's expert. *Assessors of Lynnfield* v. *New England Oyster House, Inc.*, 362 Mass. 696, 720, 290 N.E.2d 520 (1972). *Assessors of Quincy* v. *Boston Consol. Gas Co.*, 309 Mass. 60, 72, 34 N.E.2d 623 (1941).

*Decision of the Appellate Tax Board affirmed.*

## APPENDIX B

# SUPREME JUDICIAL COURT

OF MASSACHUSETTS,

SUFFOLK

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NEW BEDFORD GAS AND
EDISON LIGHT COMPANY

*v.*

BOARD OF ASSESSORS
OF DARTMOUTH

---

Before TAURO, C.J., and
REARDON, QUIRICO, KAPLAN AND WILKINS, JJ.

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*Gerald May*, Boston, for the taxpayer.
*Walter R. Smith*, Asst. Town Counsel, New Bedford, for the Board of Assessors of Dartmouth.

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Argued May 7, 1975
Decided Oct. 14, 1975

TAURO, *Chief Justice.*

This is an appeal by New Bedford Gas And Edison Light Company (taxpayer) from a decision of the Appellate Tax Board (board) allowing a motion to dismiss its petition.

The taxpayer seeks abatement of certain local taxes on tangible personal property assessed for 1973 by the board of assessors of the town of Dartmouth (assessors) for the benefit of the town of Dartmouth and three fire districts. The taxpayer's petition, brought under the formal procedure (G.L. c. 58A, § 7), alleged that "[o]n or about September 15, 1973. . .four bills or notices of taxes" were sent to the taxpayer, that these were received "about September 15, 1973," that "[o]n or about October 5, 1973" the taxpayer "applied in writing" on

proper forms for an abatement of the taxes, and that on October 31, 1973, the taxpayer paid more than one-half of the taxes due (see G.L. c. 59, § 64). The petition alleged further that the assessors "did not thereafter notify the. . .[taxpayer] of any action having been taken on said application" and that "therefore the same is deemed to have been denied." See G.L. c. 59, § 64.[1]

The assessors filed a motion to dismiss[2] the taxpayer's appeal to the board on the ground that the taxpayer's application for abatement had not been filed within the time prescribed by G.L. c. 59, § 59. After a hearing at which evidence was taken, the board allowed the assessors' motion and rendered a decision for the assessors. The taxpayer appealed. The appeal is before us now on the pleadings, certain exhibits and the board's "Findings of Fact and Report." There is no transcript of the proceedings.[3]

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[1] The petition did not allege that the three-month statutory period for action by the assessors had expired. G.L. c. 59, § 64.

[2] Rule 16 of the Rules of Practice and Procedure of the Appellate Tax Board (1974) reads in part: "An objection to the jurisdiction of the Board not apparent on the pleadings may be raised by filing a plea in bar before issue is joined or at such other time as the Board may allow." The assessors' motion to dismiss did not attack any matter apparent on the pleadings. Although the motion to dismiss was not the appropriate procedure under the board's rules, "we prefer to treat the motion as it was considered by the board and the parties as setting up the question of fact whether the application was seasonably filed." *Old Colony R.R.* v. *Assessors of Quincy*, 305 Mass. 509, 512-513, 26 N.E.2d 313, 315 (1940). "This paper, without too much regard to its title, could be treated according to its substance." *Singer Sewing Mach. Co.* v. *Assessors of Boston*, 341 Mass. 513, 515, 170 N.E.2d 687, 688 (1960).

[3] The taxpayer did not file a timely request for a stenographic transcript before any evidence was offered. See G.L. c. 58A, § 10; Rule 28 of the Rules of Practice and Procedure of the Appellate Tax Board (1974). After an adverse decision by the board, the taxpayer filed a motion to include the transcript of testimony taken by the board's stenographer in the record for appeal. A hearing was held and the motion was denied. The taxpayer does not challenge the board's denial of the motion in this appeal. Cf. *Fall River* v. *State Tax Commn.*, __ Mass. __, 326 N.E.2d 903 (1975) (Mass.Adv.Sh. [1975] 1452). The taxpayer's attorney expressly admitted this in oral argument.

In support of the board's denial of the motion, we note additionally that

[1, 2] 1. General Laws c. 59, § 59, as amended through St.1974, c. 831, § 4, permits an application for abatement to be filed "on or before October first of the year to which the tax relates or, if the tax is other than a poll tax and the bill or notice was first sent after September first of such year, on or before the thirtieth day after the date on which the bill or notice was so sent." Adherence to the schedule of application incorporated in G.L. c. 59, § 59, is an essential prerequisite to effective application for abatement of taxes and to prosecution of appeal from refusals to abate taxes. "[T]he time within which the application is to be made is not a mere matter of limitation but is an integral part of the right [to apply for abatement of taxes assessed], and the failure to apply within the prescribed time destroys the right." *Old Colony R.R.* v. *Assessors of Quincy*, 305 Mass. 509, 511-512, 26 N.E.2d 313, 314 (1940). Accord, *Canron, Inc.* v. *Assessors of Everett*, __ Mass. __, __, n. 4,[a] 322 N.E.2d 83 (1975). Manifestly, there can be no appeal to the board on the merits after the right to apply to the assessors for abatement has been lost through failure to follow statutory procedures. "Since the remedy by abatement is created by statute the board . . . has no jurisdiction to entertain proceedings for relief by abatement begun at a later time or prosecuted in a different manner than is prescribed by the statute." *Singer Sewing Mach. Co.* v. *Assessors of Boston*, 341 Mass. 513, 516, 170 N.E.2d 687, 689 (1960), quoting from *Assessors of Boston* v. *Suffolk Law Sch.*, 295 Mass. 489, 492, 4 N.E.2d 342 (1936). Cf. *New England Trust Co.* v. *Assessors of Boston*, 308 Mass. 543, 544-545, 33 N.E.2d 268 (1941); *Commonwealth* v. *Rodriquez*, 333 Mass. 501, 131 N.E.2d 774 (1956.)

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the relevant statute provides: "*For its own information only*, the board shall have stenographic notes of hearings taken and may have separate transcripts thereof prepared in proceedings which are not officially reported at the request of a party" (emphasis supplied). G.L. c. 58A, § 10, as appearing in St.1933, c. 321, § 5. See Rule 28 of the Rules of Practice and Procedure of the Appellate Tax Board (1974), which expressly precludes use by the parties of the board's stenographic notes when there has been no proper request.

[a] Mass.Adv.Sh. (1975) 81, 86, n. 4.

In the instant case, after hearing evidence, the board found that the tax bills were sent to the taxpayer on August 31, 1973, and, pursuant to a stipulation of the parties, that the application for abatement dated October 5, 1973, was received[4] by the assessors on October 9, 1973. On these facts, the board quite properly concluded that the application had not been timely and that it lacked jurisdiction to hear the appeal.[5]

2. The taxpayer challenges the board's finding that the tax bill was sent on August 31, 1973, on the ground that the finding was not supported by substantial evidence.[6] The taxpayer asserts that, when considered in light of testimony that "the bills were received in Cambridge on September 17, 1973,"[7] the assessors' evidence before the board was insufficient to support the board's finding that the bills were mailed on August 31.

[3-5] An appellant may challenge the findings of the board on the ground that they are unsupported by substantial evidence. Although a 1968 amendment (St. 1968, c. 120) to G.L. c. 30A, the State Administrative Procedure Act, ex-

[4] The determinative date under the statute is the date of receipt of the application by the assessors, not the date of mailing by the taxpayer. *Old Colony R.R.* v. *Assessors of Quincy*, 305 Mass. 509, 513, 26 N.E.2d 313 (1940).

[5] See part 4, *infra*.

[6] The taxpayer entitles its argument: "The finding . . . is not Warranted by the Subsidiary Findings." However, it is evident from the cases cited and the taxpayer's line of argument that the argument is directed to the substantiality of the evidence. The board's "Findings of Fact and Report" is pertinent primarily because it contains a summary of part of the evidence adduced at the hearing. The finding that the tax bills were sent on August 31 is, itself, a subsidiary finding of the board requiring support from the evidence and not from other subsidiary findings.

[7] According to the board's "Findings of Fact and Report," the accountant for the taxpayer's parent company testified that he received the bills in Cambridge on September 17. However, some of the bills, which are included in the record, were addressed to the taxpayer's local office in New Bedford. At oral argument, the taxpayer's counsel conceded that these bills were first received in New Bedford. The record does not indicate when these bills were received locally and contains no evidence as to what happened to the bills before they reached the parent company's office in Cambridge. The taxpayer did not retain the envelopes in which the bills were mailed.

empted the board from the provisions of the act, the board is still bound by "general principles affecting administrative decisions and judicial review of them." *Assessors of New Braintree* v. *Pioneer Valley Academy, Inc.*, 355 Mass. 610, 612, n. 1, 246 N.E.2d 792, 793 (1969). Cf. *Sherman* v. *Rent Control Bd. of Brookline*, __ Mass. __, __,[b] 323 N.E.2d 730 (1975). In accordance with such principles, findings of fact by the board must be supported by substantial evidence. *Schlaiker* v. *Assessors of Great Barrington*, __ Mass. __, __, n. 2,[c] 310 N.E.2d 602 (1974).

[6-8] However, to invoke review by this court, an appellant must supply a proper record. The appellant has the duty to assemble such materials as will make it possible for the court to consider the points of law he raises. It seems axiomatic that one who challenges a factual finding of the board on the ground that it is not supported by substantial evidence must supply at least the relevant portion of the transcript of the hearing. Rule 8(b) of the Massachusetts Rules of Appellate Procedure, 365 Mass. __ (1974), incorporated by reference in G.L. c. 58A, § 13, as appearing in St.1973, c. 1114, § 5, requires that "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion."[8] See G.L. c. 58A, § 10. In the context of appeals from the board and its predecessor, the Board of Tax Appeals, we have said repeatedly that "[s]o far as the [board's] findings are based upon unreported evidence they cannot be disturbed."[9]

[b] Mass.Adv.Sh. (1975) 431, 443.

[c] Mass.Adv.Sh. (1974) 689, 691, n. 2.

[8] Although this rule does not specifically refer to questions of substantial evidence, we construe its language "unsupported by the evidence or is contrary to the evidence" to encompass such questions.

[9] This rule may require qualification when a party challenges the board's jurisdiction on appeal after a finding by the board that jurisdiction was proper. "Consent or waiver by the parties cannot confer upon a court or administrative tribunal jurisdiction over a cause which is not vested therein by

*Coomey* v. *Assessors of Sandwich*, __ Mass. __,[d] 329 N.E.2d 117 (1975), quoting from *Commissioner of Corps. & Taxn.* v. *J. G. McCrory Co.*, 280 Mass. 273, 278, 182 N.E. 481 (1932). Accord, *Revere* v. *Revere Constr. Co.*, 285 Mass. 243, 247, 189 N.E. 73 (1934); *Commissioner of Corps. & Taxn.* v. *Ford Motor Co.*, 308 Mass. 558, 572, 33 N.E.2d 318 (1941); *De Cordova* v. *Commissioner of Corps. & Taxn.*, 314 Mass. 371, 374, 50 N.E.2d 7 (1943). Cf. *Commissioner of Corps. & Taxn.* v. *Boston Edison Co.*, 310 Mass. 674, 677-678, 39 N.E.2d 584 (1942).

[9] In the instant case, the failure of the taxpayer to secure a copy of the transcript for inclusion in the record on appeal limits the scope of our review. Without the evidence before us, we cannot consider the taxpayer's claim that a finding of the board was unsupported by substantial evidence. The summary of evidence contained in the board's "Findings of Fact and Report" is no substitute for a transcript. Before any evidence was offered, it was open to the taxpayer to request an official report of the proceedings. G.L. c. 58A, § 10. Rule 28 of the Rules of Practice and Procedure of the Appellate Tax Board (1974). Having neglected to make such a timely request, the taxpayer cannot now press a question of law concerning substantial evidence.[10]

3. The taxpayer also contends that the board's action in allowing the motion to dismiss denied it due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. The taxpayer argues that the interval between September 17, 1973, the date on which it alleges the tax bill was received, and October 1, 1973, the date by which it would have had to file an application for abatement to comply

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the law." *Assessors of Boston* v. *Suffolk Law Sch.*, 295 Mass. 489, 495, 4 N.E.2d 342, 346 (1936). We reserve decision on what qualification may be necessary when an inadequate record seems likely to confer additional jurisdiction on the board.

[d] Mass.Adv.Sh. (1975) 1684, 1689.

[10] The taxpayer's belated motion for inclusion of a transcript in the record for appeal could not preserve this issue for appeal. See n. 3, *supra*.

with the jurisdictional requirements imposed by the board, was too short to afford it a practical opportunity to file for an abatement and obtain review of the assessors' determination. The taxpayer concedes that the constitutional question was not raised before the board, but asserts that an issue of constitutional law may be presented to this court although it was not argued before the board.

[10, 11] Once again, we do not reach the merits of the taxpayer's argument. General Laws c. 58A, § 13, as appearing in St.1973, c. 1114, § 5, provides that "[t]he court shall not consider any issue of law which does not appear to have been raised in the proceedings before the board." As the due process issue was not so raised, it is not properly before us. See, e.g., *Assessors of Worcester* v. *Knights of Columbus Religious Educ. Charitable & Benevolent Assn. of Worcester*, 329 Mass. 532, 534, 109 N.E.2d 447 (1952); *Assessors of Everett* v. *General Elec. Co.*, 330 Mass. 464, 466, 115 N.E.2d 359 (1953); *Assessors of Dover* v. *Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 535, 137 N.E.2d 225 (1956); *Cacciatore* v. *State Tax Comn.*, __ Mass. __, __, __, __,[e] 330 N.E.2d 850 (1975). Although a limited exception to the statutory rule has been developed for jurisdictional questions, which entail a fundamental determination of the scope of the power conferred on the board by the Legislature and a cognate determination of the ability of the board to decide the case in the first instance (see *Assessors of Boston* v. *Suffolk Law Sch.*, 295 Mass. 489, 495-496, 4 N.E.2d 342 [1936]), there is no such exception for constitutional questions such as the one argued here (see *Wellman* v. *Commissioner of Corps. & Taxn.*, 289 Mass. 131, 139-140, 193 N.E. 733 [1935]). To raise a constitutional question on appeal to this court from the board, the taxpayer must present the question to the board and, in so doing, make a proper record for appeal. Otherwise, the taxpayer waives the right to press the constitutional argument. The

[e] Mass.Adv.Sh. (1975) 2010, 2013-2014.

authorities cited by the taxpayer in support of its right to argue the constitutional questions before us are inapposite.

[12-14] 4. As an adjunct to its due process argument (see part 3, *supra*), the taxpayer directs us to certain language in G.L. c. 59, § 57, as amended through St.1973, c. 52, § 6: "Except as otherwise provided, bills for real estate and personal property taxes shall be sent out not later than June fourteenth of each year . . .". The taxpayer contends that this language is mandatory, that G.L. c. 59, § 59, must be read together with this language and that such reading guarantees the taxpayer three and one-half months as "the appropriate period for notice and opportunity to be heard." This argument, like the central due process argument, is not properly before us. There is no hint in the record that any such issue of statutory construction was raised before the board. *Cacciatore* v. *State Tax Commn.*, __ Mass. __, __, __, __,[f] 330 N.E.2d 850 (1975). See authorities cited, *supra*, at __,[g] 330 N.E.2d 850. However, we add a few words to clarify procedure for the future. General Laws, c. 59, § 59, establishes the time within which a taxpayer may apply to the assessors for an abatement. The statute grants the taxpayer, at the minimum, thirty days from the day when the assessors send the tax bill. Irrespective of whether the above-quoted language in G.L. c. 59, § 57, is mandatory[11] (compare *Singer Sewing Mach. Co.* v. *Assessors of Boston*, 341 Mass. 513, 515, n. 1, 170 N.E.2d 687 [1960], with *Boston* v. *DuWors*, 340 Mass. 402, 403, 404, 164 N.E.2d 311 [1960], and *Alves* v. *Braintree*, 341 Mass. 6, 11, n. 1, 166 N.E.2d 720 [1960]; see G.L. c. 60, §§ 3, 3A; see also St.1943, c. 166), we discern in the language no legislative effort to amplify the time available for filing applications for abatement or to alter the jurisdictional requirements for appeals to the board. There is no indication in G.L. c. 59 that tardiness on the part of the

[f] Mass.Adv.Sh. (1975) 2010, 2013-2014.

[g] Mass.Adv.Sh. (1975) at __.

[11] We do not now reach this point.

authorities in the mailing of tax bills will excuse the taxpayer's noncompliance with the explicit timing requirements of G.L. c. 59, § 59. Our previous decisions have applied, and when necessary, enforced these explicit requirements without variation. See, e.g., *Old Colony R.R.* v. *Assessors of Quincy*, 305 Mass. 509, 26 N.E.2d 313 (1940); *Singer Sewing Mach. Co.* v. *Assessors of Boston*, 341 Mass. 513, 517-520, 170 N.E.2d 687 (1960); *Assessors of New Braintree* v. *Pioneer Valley Academy, Inc.*, 355 Mass. 610, 618-619, 246 N.E.2d 792 (1969); *Canron, Inc.* v. *Assessors of Everett*, __ Mass. __, __, __, __,[h] 322 N.E.2d 83 (1975).

5. For the reasons discussed above, the appeal is dismissed.

*So ordered.*

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[h] Mass.Adv.Sh. (1975) 81, 88-91.

## APPENDIX C

Form 72.

### The Commonwealth of Massachusetts

APPELLATE TAX BOARD
Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston, Mass. 02202

Fiscal year 1980

FOX RIDGE ASSOCIATES & CO.,

APPELLANT.

BOARD OF ASSESSORS OF THE TOWN OF MARSHFIELD,

APPELLEE.

### DECISION

Decision for the appellant; abatements granted in the amounts stated in and based on the schedule set forth below, all pursuant to applicable law in general and to G.L. c. 58A, §14 in particular.

| *Docket Number* | *Location* | *Assessed Valuation* | *Fair Cash Value* | *Equalized Tax Rate* | *Tax Assessed* | *Taxes Due* | *Abatement* |
|---|---|---|---|---|---|---|---|
| 108292 | 738 Plain | $169,960 | $348,270 | .39 | $15,466.36 | $13,582.56 | $1,883.80 |
| 108293 | 742 Plain | 230,185 | 471,679 | " | 20,946.84 | 18,395.51 | 2,551.33 |
| 108294 | 794 Plain | 342,445 | 701,715 | " | 31,162.50 | 27,366.91 | 3,795.59 |
| 108295 | 792 Plain | 382,995 | 784,808 | " | 34,852.55 | 30,607.51 | 4,245.04 |
| 108296 | 682 Plain | 145,920 | 299,009 | " | 13,278.72 | 11,661.37 | 1,617.35 |
| 108297 | 786 Plain | 171,345 | 351,109 | " | 15,592.40 | 13,693.25 | 1,899.15 |
| 108298 | 782 Plain | 171,180 | 350,770 | " | 15,577.38 | 13,680.06 | 1,897.32 |
| 108299 | Plain St | 198,880 | 407,531 | " | 18,098.08 | 15,893.73 | 2,204.35 |
| 108300 | 748 Plain | 207,705 | 425,615 | " | 18,901.16 | 16,598.99 | 2,302.17 |
| 108301 | 756 Plain | 211,280 | 432,941 | " | 19,226.48 | 16,884.70 | 2,341.78 |

APPELLATE TAX BOARD
BY (s) RUTH L. KLEINFELD, Chairman.
(s) PETER J. ALLEN, Member.
(s) JOHN P. MULVIHILL, Member.
(s) RUDOLPHE W. OUELLETTE, Member.
(s) ROBERT R. LEBLANC, Member.

Date: Oct. 22, 1980

(SEAL) Attest: (s) RICHARD B. WILLIS,
*Clerk of the Board.*

## APPENDIX D

1982 - 57

COMMONWEALTH OF MASSACHUSETTS

**APPELLATE TAX BOARD**

---

DOCKET NOS. 103482 - 103492, INCL.
108292 - 108301, INCL.

FOX RIDGE ASSOCIATES AND COMPANY

*v.*

BOARD OF ASSESSORS OF THE TOWN OF MARSHFIELD

---

Promulgated: February 4, 1982

These are appeals under the formal procedure pursuant to G.L. c. 59, §§64 and 65, as amended, from the refusal of the appellee to abate taxes on certain real estate owned by the appellant for the fiscal years 1979 and 1980.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, §13, as amended, and Rule 32 of the Rules of Practice and Procedure of the Appellate Tax Board.

*Walter L. Sullivan*, Esq., for the appellant.
*John F. Ridge*, Esq., for the appellee.

### FINDINGS OF FACT AND REPORT

Appellant was the owner of certain parcels of real estate located at Plain Street in Marshfield on January 1, 1978 and January 1, 1979, the applicable assessment dates, and all taxes were greater than $2,000.00. The following is a chart depicting information utilized by the board to determine jurisdiction:

| *Fiscal Year* | *Application for Abatement* | *Taxes Paid* | *Denial* | *Appeal Filed* |
|---|---|---|---|---|
| 1979 | Dec. 22, 1978 | Dec. 22. 1978 | None | Apr. 11. 1979 |
| 1980 | Dec. 13, 1979 | Dec. 13, 1979* | Feb. 6, 1980 | Feb. 29, 1980 |

* Docket No. 108296, taxes paid Nov. 28, 1979

Since all of the above enumerated filings occurred on the same date in the various years, the findings are applicable to all individual docket numbers.

With regard to the applications for abatement, it is found that they were filed within 30 days of the mailing of the tax bills.

With regard to the second-half tax payments for FY 1979, appellant was granted extensions up to and including May 1, 1980, and for FY 1980 the hearing on the merits was held on April 16, 1980 prior to the due date for the payment. Based upon all of this information, namely the timely payment of taxes and the timely filing of application for abatement and petitions to this board, jurisdiction is specifically found to hear all appeals.

The parcels include 20.44 acres of land, which is a composite of several irregular lots. It is improved with 23 wood, stucco and brick muti-family dwellings numbered 738-794 Plain Street and four wood and brick multi-family dwellings numbered 678-682 Plain Street. All of the structures contain 12 living units each with a mix of efficiency, one-bedroom and two-bedroom units. There is a total of 324 dwelling units ranging in size from 690 square feet to 900 square feet. There are also supporting facilities as follows: paved roads, parking areas, tennis courts, and a pool and cabana. The improvements were well maintained and the construction was of fair quality. For a more detailed description of the property, see Exhibit 10, pages 12-14, which were adopted by the board as findings of fact.

At the hearing, at which the appellee was not present, appellant introduced an expert who utilized the capitalization of income approach to value. He used the actual income and expense figures for calendar years 1977 and 1978. These are located at pages 21-23 and 25-27 of Exhibit 10. After deducting the expenses, he also allowed a "Reserve for Replacement" totalling $40,450.00 for short-lived items such as refrigerators, stoves, etc.

For FY 1979 the net income figure utilized was $489,207 to which was applied a capitalization rate of .16, comprised of .093 rate of return, .0286 depreciation recapture and .0403 tax factor. Thus, he arrived at a fair cash value figure of $3,000,000.00. For FY 1980 the net income figure utilized was $452,610 to which was applied a capitalization rate of .16, comprised of .093 rate of return, .0286 depreciation recapture and .0382 tax factor. Thus, he arrived at a fair cash value figure of $2,800,000.00.

Since no evidence was presented by the appellee, the board adopted the gross figures of the appellant, as follows: FY 1979, $869,061, and FY 1980, $884,386. The board found that the expenses applicable to both years were the following categories provided by the appellant: operating, maintenance and payroll tax and insurance. The board also utilized a 6% of gross income as management fee. This was higher than used by the appellant because cash values:

FY 1979—$4,682,900
FY 1980—$4,574,000

Abatements were granted in accordance with the decision, a copy of which is attached.

## OPINION

Two issues are raised by these appeals: overvaluation and disproportionate assessment.

As to overvaluation, the standard to be used in determining "fair cash value" is well known and without dispute. It is the price at which a willing seller, not under compulsion to sell, will sell and a willing buyer, not under compulsion to buy will buy the property in question, each party having full knowledge of all relevant facts. *Boston Gas Company* v. *Assessors of Boston*, 334 Mass. 549 (1950).

The decision of the board, although required to be based upon evidence presented, need not coincide with the valuation given by any witness. The market value of any real estate can-

not be determined with mathematical certainty, but must ultimately rest in the realm of opinion, estimate and judgment. *Assessors of Quincy* v. *Boston Consolidated Gas Company*, 309 Mass. 60 (1941). The board is not required to specify the exact manner in which it arrives at its fair cash value figures. *Jordan Marsh Company* v. *Assessors of Malden*, 359 Mass. 106 (1971).

The board used an effective tax factor in its capitalization rate in arriving at the fair market value of the subject property. The purpose of a tax factor in a formula for capitalizing earnings is to reflect the tax which will be payable on the assessed valuation produced by the formula; where the fair cash value determined by the capitalization of earnings is to be reduced in arriving at the assessed valuation, the tax factor must be proportionately reduced. See *Assessors of Lynn* v. *Shop Lease Company, Inc.*, 364 Mass. 569, 573 (1974).

As to disproportionate assessment for the fiscal year 1979, a taxpayer has a right to have his assessment reduced so that it is "proportional to the assessments of the class of property valued at the lowest percentage of fair cash value." *Assessors of Weymouth* v. *Thomas E. Curtis and Others Trustees*, 1978 Adv. Sh. 1676, 1684, quoting *Shoppers World, Inc.* v. *Assessors of Framingham*, 348 Mass. 366, 377 N. 10 (1965); *Tregor* v. *Assessors of Boston*, 1979 Adv. Sh. 770.

The board can utilize the equalization studies prepared by the Commissioner in arriving at a figure for the disproportionate assessment. See M.G.L. c. 58A, §12C; *Tregor*, supra at p. 779; and *Kenniston* v. *Assessors of Boston*, 1980 Adv. Sh. 1485 at 1498.

For years beginning in 1980, see G.L. c. 58A, §14; St. 1979, c. 797, §§10 and 14; *Kenniston*, supra; and Mass. Constitution, Art. 112.

These principles were applied by the board in determining the fair cash value for the appellant's real estate in these appeals.

Our decision was promulgated October 22, 1980.

APPELLATE TAX BOARD

By (s) John P. Mulvihill, Chairman

## APPENDIX E

ATTY. WALTER L. SULLIVAN
8 Otis Place
P.O. Box 30
Scituate, MA 02066

November 5, 1982

Chief Justice
Edward F. Hennessey
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: Fox Ridge Associates & Co.
vs.
Board of Assessors of the Town of Marshfield
No. SJC-2793
Petition for Rehearing under Rule 27

Dear Chief Justice Hennessey:

The Appellant does hereby Petition for Re-Hearing on the basis that the Court has overlooked or misapprehended the points of law raised in Appellant's appeal.

In essence, in affirming the Decision of the Appellate Tax Board, the Court relied upon the absence of a transcript. The Brief of the Appellant acknowledged the existence of the line of Decisions dealing with the absence of a transcript; but distinguished the same from its case where the Appellee chose not to participate in the proceedings below with the result that Appellants' presentation would be untested by cross examination or the testimony and evidence of Appellee and its experts. It is apparent that where there is testimony and evidence presented by one side only that a transcript is not necessary to determine if the Decision below was supported by substantial evidence. In other words, it is Appellants' thesis that the Ap-

pellate Tax Board has no right to interject its own opinions with respect to questions of valuation and methodology for arriving at value.

Appellants' Appeal does not deal with the substance of the Decision below; but rather whether the Appellate Tax Board had the right to substitute its own opinion, without rejecting the Appellants' testimony and evidence. Under the theory of *Winefield* v. *Assessors of Hull*, 554 Mass. 760, Appellant has met the burden of creating and assembling a record sufficient for this Court to decide the case.

Following the rule of *New Boston Garden Corp.* v. *Board of Assessors of Boston*, 81 AS 1023, evidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason. The Appellate Tax Board violated this rule by substituting its personal opinion as to appropriate expenses and capitalization rate, in a case where the Appellee chose not to participate in the proceedings and test the sufficiency of the Appellants' position as to the same. The Appellate Tax Board had no evidence before it to support its decision. It is conceded under the principal of *Nahant* v. *Costin*, 356 Mass. 726, that the Board was not required to accept the opinion expressed, or the valuation principals used, by the Appellants' expert witness. However, the Board did have the responsibility of giving objectively adequate reasons for disbelieving or qualifying the opinion of value offered by the Appellant.

Although the Appellate Tax Board is exempted from the provisions of the State Administrative Procedure Act, (Chapter 30A), the Board is still bound by general principals affecting admi..istrative decisions and judicial review of them. The obligation of the Board with respect to its findings is set forth in Mass. General Laws Chapter 30A, Section 11(8). "Every agency decision shall be in writing. . . and shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to

the decision. . ." In *Salisbury Water* v. *Department of Public Utilities*, 344 Mass. 716, the Court said that "one of the duties of judicial review is to determine "upon consideration of the entire record", whether substantial rights have been prejudiced because the agency decision was unsupported by substantial evidence. . . .At the hearings the companies introduced evidence to show that in order for them to provide a fair return on their equity and debt capital, rearranged in proportions beneficial to the company. . .they should increase their rates to produce annual gross revenues of substantially higher percentages. . . The Companies called as a witness, an expert in the field of public utility financing whose qualifications were unquestioned. . . No evidence was offered by the Department or any Town in any of the cases. The Department accepted the rate basis used by Salisbury and reduced the rate bases used by Oxford and Millbury. . .and allowed as rates of return: Salisbury 6.5%, Oxford 6% and Millbury 6%. The decisions of the Department failed completely to give any reasons and do not and cannot refer to evidence in the record which might fairly support its conclusion. . . It may be conceded that the Department is not bound by the testimony of the Company's expert, but non-acceptance of testimony does not create substantial evidence to the contrary. The reference to "expertise" is some clue to the action of the Department but its expert skill, however great cannot beget power to substitute undisclosed evidence. Its authority in this respect is clearly set forth in General Laws Chapter 30A, Section 11(5), which reads "Agencies may take notice of any fact which may be judicially noticed by the Courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the materials so noticed and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence and specialized knowledge in

the evaluation of evidence presented to them. . . .A finding without evidence is arbitrary and baseless". (In *Arthurs* v. *Board of Registration in Medicine*, 81 AS 849, the Court observed that while the Board of Registration in Medicine is free to evaluate evidence in light of its expertise, it cannot use its expertise as a substitute for evidence in the record.

The issue cited does not require a transcript to be reviewed by the Supreme Judicial Court.

Respectfully submitted,

WALTER L. SULLIVAN

WLS:jmt
cc: John F. Ridge, Esquire

APPENDIX F

# SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

Room 1412 Court House

Boston, Massachusetts 02108

(617) 725-8055

Patrick J. Hurley
*Clerk*

Frederick J. Quinlan
*Assistant Clerk*

November 23, 1982

Walter L. Sullivan, Esq.

8 Otis Place
P.O. Box 30
Scituate, Massachusetts 02066

Re: Fox Ridge Associates & Co.
vs.
Board of Assessors of Marshfield
Supreme Judicial Court No. SJC-2793

Dear Mr. Sullivan:

Your Petition for Rehearing in the above captioned case has been considered by the court and is denied.

Very truly yours,

S/ILLEGIBLE
*Clerk*

cc: John F. Ridge, Esq.
Rockland Trust Building
Cushing Plaza, Route 3A
Cohasset, MA 02025

## APPENDIX G

### MASSACHUSETTS GENERAL LAWS

**Ch. 58A, § 10. Stenographic reports; costs; waiver of appeal**

At the request of any party made before any evidence is offered, the board shall order that all proceedings in a pending appeal be officially reported by a stenographer. The board may contract for the reporting of such proceedings at the expense of the commonwealth in the first instance, but shall collect the cost thereof from the persons requesting that the proceedings be reported. In such contract the board may provide that one or more copies of the transcript be supplied to the board without cost to the commonwealth, and may fix the terms and conditions upon which transcripts will be supplied to other persons and agencies by the stenographer. No proceedings shall be reported officially until an amount equal to the cost thereof, as estimated by the clerk, shall have been deposited with him at such times and in such manner as may be provided by the rules of the board. Any excess deposit over the actual cost shall be returned to the depositor by the clerk. If no party requests that the proceedings be reported, all parties shall be deemed to have waived all rights of appeal to the supreme judicial court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence. The right of appeal upon questions of law raised by the pleadings or by an agreed statement of facts or shown by the report of the board shall not be deemed to be waived. For its own information only, the board shall have stenographic notes of hearings taken and may have transcripts thereof prepared in proceedings which are not officially reported at the request of a party.

Amended by St.1933, c.321, § 5.

## APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

# SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

No. SJC-2793

---

FOX RIDGE ASSOCIATES & CO.,

APPELLANT,

*v.*

BOARD OF ASSESSORS
OF THE TOWN OF MARSHFIELD,

APPELLEE.

---

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY FOX RIDGE ASSOCIATES & CO.

Notice is hereby given that Fox Ridge Associates & Co., ("Appellant") hereby appeals to the Supreme Court of the United States from the final decision of the Supreme Judicial Court of the Commonwealth of Massachusetts rendered on November 23, 1982, denying Appellant's Petition for Rehearing and affirming the Decision of said Court affirming the Decision of the Appellate Tax Board of the Commonwealth of Massachusetts.

Respectfully submitted,

s/ WALTER L. SULLIVAN
WALTER L. SULLIVAN
*Attorney for Fox Ridge Associates & Co.*
8 Otis Place
P.O. Box 30
Scituate, Ma. 02066
Tel: (617) 545-4430

AFFIDAVIT OF SERVICE

I, Walter L. Sullivan, attorney of record for Fox Ridge Associates & Co., Appellant herein, depose and say that on the 11th of January, 1983, I served three copies of the Notice of Appeal on the Board of Assessors of the Town of Marshfield, Appellee herein, by delivering the same to the receptionist in the office of John F. Ridge, counsel of record to said Board of Assessors of the Town of Marshfield, located at Rockland Trust Company Building, Cushing Plaza, Route 3A, Cohasset, Massachusetts 02025.

All parties required to be served have been served.

s/WALTER L. SULLIVAN
WALTER L. SULLIVAN

Subscribed and sworn to before me, at Scituate, Massachusetts, this 11th day of January, 1983.

s/JOAN M. THURESON
*Notary Public*
My commission expires: 11-19-87

APPENDIX I

# SUPREME JUDICIAL COURT
OF MASSACHUSETTS,

No. A-680
FOX RIDGE ASSOCIATES AND CO.,
APPELLANT,
*v.*
BOARD OF ASSESSORS OF MARSHFIELD,
APPELLEE.

## ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including April 20, 1983.

s/WILLIAM J. BRENNAN
*Associate Justice of the Supreme Court of the United States*

Dated this 8th day of February, 1983.